



# Virginia Regulatory Town Hall Agency User Manual

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## Part 1: Rulemaking in Virginia

This section covers the following topics in the order listed:

- Basic questions & answers about rulemaking
- Legal basis for rulemaking
- Types of regulatory actions
- Flow charts of regulatory processes
- Public participation in rulemaking
- Executive branch review of regulatory actions
- How to write a regulation

# Basic Q & A about rulemaking

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*Click on a question or scroll down*

- What is a regulation?
  - How is a regulation promulgated?
  - How can the public participate in the regulatory process?
  - What is the Virginia Administrative Code (VAC)?
  - What is the Virginia Administrative Process Act (APA)?
  - What is executive branch review?
  - What is an economic impact analysis (EIA)?
  - What are guidance documents?
  - What is The Virginia Register of Regulations?
- 

## What is a regulation?

A regulation is a general rule governing people's rights or conduct that is promulgated by a state agency and has the force of law. Agencies promulgate regulations in order to administer and enforce specific state laws and to implement general agency objectives. Each regulation must be authorized by law. Each chapter of the Virginia Administrative Code (VAC) contains a single regulation.

## How is a regulation promulgated?

Click [here](#) for a chart of the standard regulatory process. A regulation is created, amended, or repealed through a regulatory action. Typically, regulatory actions take about 18 months from start to finish. The purpose of a regulatory action is to ensure that the public has an opportunity to participate in the rulemaking process and that all perspectives are considered in the development of a final regulation. In addition, proposed regulations must meet the Governor's policy goals as set out in his Executive Order and are usually subject to an economic impact analysis.

Unless there are special circumstances (detailed at the end of this section), each regulatory action goes through a mandatory three stage process. These stages are the Notice of Intended Regulatory Action (NOIRA), Proposed regulation, and Final regulation.

**Notice of Intended Regulatory Action (NOIRA):** The public receives notification that a regulatory change is being considered, along with a description of the changes being considered. Once this stage is published in *The Virginia Register of Regulations* and appears on the Town Hall, there is at least a 30-day period during which the agency receives comments from the public. The agency reviews these comments as it develops the proposed regulation.

**Proposed:** The public is provided with the full text of the regulation, a statement explaining

the substance of the regulatory action, and an Economic Impact Analysis (EIA) prepared by the Department of Planning and Budget. Once the proposed stage is published in *The Virginia Register of Regulations* and appears on the Town Hall, there is at least a 60-day public comment period. Based on the comments received, the agency may modify the proposed text of the regulation. The agency also provides a summary of comments that have been received during the NOIRA period, and the agency's response.

**Final:** The public is provided with the full text of the regulation, this time with an explanation of any changes made to the text of the regulation since the proposed stage. Once the final stage is published in *The Virginia Register of Regulations* and appears on the Town Hall, there is a 30-day final adoption period.

### **Special circumstances:**

#### **Emergency regulations**

Click [here](#) for a chart of the emergency regulatory process. Sometimes, the General Assembly passes a law requiring an [emergency regulation](#). Emergency regulations are effective for up to one year and are exempt from the usual regulatory process. Usually, an agency will promulgate an emergency regulation and, at the same time, begin a regulatory action for a permanent replacement regulation.

#### **Exempt regulations**

Some regulatory actions are [exempt](#) from the regulatory process described above: actions of exempt agencies, regulations setting rates or prices or relating to internal agency working, and regulations with technical changes or changes to strictly conform to changes in federal or state law. Most exempt regulations are published in final form only, however, some exempt actions can include notice and publication of a proposed text.

#### **Fast-track regulations**

Click [here](#) for a chart of the fast-track regulatory process. The fast-track rulemaking process is for rules that are expected to be noncontroversial. Whether a rule is noncontroversial is determined by the process as follows:

After review by the Governor, a notice of a proposed fast-track rulemaking will be published in the Virginia Register and will appear on the Virginia Regulatory Town Hall. This will be followed by a public comment period of at least 60 days.

If, during the public comment period, any of the follow raise objections, the proposed rulemaking is continued using the normal process:

- Any member of the applicable standing committee of Senate,
- Any member of the applicable standing committee of the House of Delegates,
- Any member of the Joint Commission on Administrative Rules (JCAR), or
- Any objection from ten or more members of the public.

The agency will not have to start over from the beginning, however, as the initial publication of the fast-track regulation will serve as the Notice of Intended Regulatory Action (NOIRA).

If there are no objections as described above, the regulation will become effective 15 days after the close of the public comment period, unless the regulation is withdrawn or a later

effective date is specified by the agency.

For additional information, please refer to § 2.2-4012.1 of the Code of Virginia.

## How can the public participate in the regulatory process?

There are many ways the public can participate in the regulatory process. These opportunities include making a public comment, attending board meetings and public hearings, joining an ad hoc advisory committee, and submitting a petition for rulemaking. An agency's [public participation guidelines](#) sometimes provide additional information on how to participate.

**Making a public comment:** The public may submit comments for 30 days after a Notice of Intended Regulatory Action (NOIRA) stage is published in *The Virginia Register of Regulations*, and 60 days after a proposed stage is published. If a member of the public becomes a registered Town Hall user, the registered user may be able to submit a comment directly on the Town Hall by clicking on [View public comment forums](#). If the agency is not receiving comments on the Town Hall, registered users may go to a regulation's Action Information page to determine to whom to send public comments.

**Attending board meetings and public hearings:** Through the Town Hall notification service, the public can find out when board meetings and public hearings will be held where regulations will be discussed.

**Joining an ad hoc advisory committee:** Often an agency will put together a committee consisting of regulants, advocacy groups, and other concerned citizens to assist the board in drafting or amending regulations.

**Petition for rulemaking:** A member of the public can request an agency to develop a new regulation or amend an existing regulation at any time. An agency must respond to a petition for rulemaking within 180 days. Click [here](#) for a chart of the petition for rulemaking process.

## What is the Virginia Administrative Code (VAC)?

The Virginia Administrative Code (VAC) is the official source for Virginia's regulations. The VAC consists of approximately 1,250 chapters (regulations). You can link to the official text of a regulation in the VAC on each Chapter Information page of the Town Hall. Here is the format of a VAC citation:

**Example: 24 VAC 5-20-40**

<b>24</b>	<b>Title Number:</b> There are <a href="#">24 titles</a> in the Virginia Administrative Code. For example, Title 24 contains all regulations pertaining to Transportation and Motor Vehicles.
<b>VAC</b>	Abbreviation for Virginia Administrative Code.
<b>5</b>	<b>Board Number:</b> There are <a href="#">122 boards</a> in Virginia. For example, Board 5 of Title 24 contains regulations of the Virginia Aviation Board.
<b>40</b>	<b>Chapter Number:</b> There are approximately 1,250 chapters in the Virginia Administrative Code. Each chapter contains one regulation. For example, chapter 20 under Title 24, Board 5 contains a regulation about the licensing and operation of airports and aircraft and obstructions to airspace in Virginia.

## What is the Virginia Administrative Process Act (APA)?

The [Virginia Administrative Process Act \(APA\)](#) provides the basic framework for rulemaking in Virginia. Article 2 of the APA, in particular, sets out the stages of the regulatory process, including notice and comment; requires agencies to promulgate public participation guidelines on how the public can be involved in the rulemaking process; and requires the Governor to publish procedures for executive review of regulations.

## What is executive branch review?

Before a stage of a regulatory action becomes available for public comment, it often undergoes review by the Office of Attorney General, the Department of Planning and Budget, the Cabinet Secretary, and the Governor. Executive branch review includes certifying that the regulation is consistent with statutory authority and assessing the economic costs and benefits of the regulation. It also includes making sure that regulations are clearly written and easily understandable to the regulated community, determining if the regulation is essential to protect public health, safety, and welfare, and is the least burdensome and intrusive regulation possible.

## What is an economic impact analysis (EIA)?

An economic impact analysis (EIA) is prepared by the Department of Planning and Budget. An EIA summarizes the costs and benefits that are expected to result from the implementation of the regulatory language. The analysis includes an evaluation of any unintended consequences the new rule may have and assessment of any less intrusive and more cost effective alternatives. The EIA must also include information on the number and types of entities affected by a regulatory action, and on the effects the regulation will have on particular localities, on employment, and on the use and value of private property. The Department has 45 days from the date of submission to complete its economic analysis. EIAs can be found on the Stage Information page for each proposed regulatory action.

## What are guidance documents?

[Guidance documents](#) are developed by state agencies to provide general information to agency staff or the public on how to implement or interpret state law or agency regulations. Links to guidance document lists can be found on Board and Chapter Information pages.

## What is The Virginia Register of Regulations?

[The Virginia Register of Regulations](#) is the official publication of legal record in Virginia for regulatory actions. Citations to the Register are available on each Stage Information page of the Town Hall.

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# Legal basis for rulemaking

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- [Laws and regulations governing rulemaking](#)
  - [General legal principles \(written by the Office of the Attorney General\)](#)
- 

## Laws and regulations governing rulemaking

The following laws and regulations set out the legal authority to promulgate a regulation in Virginia. They also set out the process for how a regulation is promulgated.

### Whether your agency/board has authority to promulgate a regulation is determined by:

- Your agency's authorizing statute in the Code of Virginia
- Federal statutes and regulations, if applicable

### The process for promulgating a regulation is set out in:

- [Administrative Process Act, specifically Article 2](#)
- [Executive Order 21 \(2002\) – Development and Review of Regulations Proposed by State Agencies](#) (PDF file)
- Your agency or board's public participation guidelines

### The requirements for publication in the *Virginia Register of Regulations* are set out in:

- [Virginia Register Act](#)
- [Regulations of the Virginia Code Commission for implementing the Virginia Register Act](#)
- [Virginia Register Form, Style, and Procedure Manual](#) (RTF document)

## General legal principles (written by the Office of the Attorney General)

Jump down to

- [Good regulatory practice](#)
- [Review by the Office of the Attorney General \(OAG\)](#)
- [How to make a regulation enforceable](#)
- [Ex parte communications](#)
- [Keeping a permanent record](#)
- [Incorporation by reference](#)

### Good regulatory practice

Regulations of the type covered by this guide are administrative “legislation” and thus have the force and effect of law. The precise definition of “regulation” is found in § 2.2-4001 of the Code of Virginia, a part of the Administrative Process Act (APA):

*any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.*

This distinguishes a regulation from an agency policy--which lacks the legal status of a regulation--and from a guidance document ([§ 2.2-4001 of the Code of Virginia](#)). A guidance document is the closest thing in Virginia statutory law to an "interpretative" regulation. It merely tells the public and agency staff how an agency interprets its statutes and regulations.

The APA definition is the key to good regulatory practice. Agencies should keep in mind certain basic principles as they consider promulgating regulations. These are:

- the agency must identify its statutory authority to promulgate,
- the necessity for a regulation--having the force of law—as opposed to a policy or a guidance document,
- a consideration of which procedures (APA Article 2, emergency or exempt process) are necessary and appropriate for the promulgation,
- the need to comply with applicable executive orders, and
- the need for a record to support the regulation to be promulgated.

Remember that the APA does not supersede the agency's basic law. If the agency fails to comply with the latter in the course of promulgating regulations, a challenge is easy and the challenger does not need to show harm in order to prevail. See *Water Control Board v. Appalachian Power*, 9 Va. App. 254, 386 S.E.2d 633 (1989).

### **Review by the Office of the Attorney General (OAG)**

The formal role of the Attorney General in the regulatory process is limited. [Section § 2.2-4013 \(A\)](#) of the Code contains the only statutory duty—to review regulations for statutory authority. Recent executive orders have expanded the number and nature of certifications agencies are to request from the OAG. Typically an agency will contact its own counsel within the OAG and request one of these certifications. Experienced regulatory coordinators will work with their counsel so that deadlines can be met and problems avoided and, if possible, involve their own counsel during the preliminary stages of development.

The less formal role of the OAG varies, but it can be considerable. Some agencies involve their counsel in the development of some or all of their regulations. When appropriate, this may save considerable time. If the lawyer is in on the ground floor, drafting problems may be eliminated and delays avoided. Legal problems identified in a draft or final regulation are typically handled through privileged communications which, even if put in writing, do not find their way into the public record. Statements of authority, on the other hand, are made part of the agency's regulatory package and so are public documents.

### **How to make a regulation enforceable**

First and foremost, a regulation must be supported by statutory authority. Express authority is best, but implied authority is sufficient provided it can be fairly implied from the language used in the basic law or it is necessary to enable the agency to exercise the powers that are expressly granted. See *Muse v. Alcohol Beverage Control Board*, 9 Va. App. 74, 384 S.E.2d 110 (1989). For example, the power to impose a lesser sanction such as a license restriction, but it does not necessarily follow that the agency has the power to impose a monetary penalty or fine.

A properly promulgated and adopted regulation is entitled to a presumption of validity in a judicial proceeding. See [§ 2.2-4027 of the Code of Virginia](#). That is the goal. While it may seem elementary and perhaps even unnecessary, the best way to achieve it is as follows: Write the regulation clearly, in simple English. Avoid technical terminology as much as possible. Spell out what is to be done or not to be done and the penalty for any violation. Relate the regulation clearly to its statutory authority. The regulation must be understandable to (1) the regulated community (2) lawyers who may end up challenging or defending it, and (3) a court which may hear that challenge.

In summary:

- Be sure about the statutory authority of the agency to promulgate and adopt the regulation.
- Be sure the regulation is necessary, that making more law is the most efficient and effective way for the agency to carry out its mandate.
- Be sure about and follow exactly the procedures necessary to promulgate the regulation. Bend over backwards to accommodate public input into the process and to avoid procedural errors. Public involvement is mandated through public participation guidelines. See [2.2-4007 of the Code of Virginia](#).
- Be sure the record contains everything the agency uses to support promulgation of the regulation.

### **Ex parte communications**

This is a need to distinguish between *ex parte* communication and late comment. In the case of the latter—when a regulatory record has closed—nothing new should be added unless the record is officially reopened for further public comment. Reopening the record should be limited because once the statutory process has been followed, adding late comments opens up an endless chain of reopening because the public must have an opportunity to comment on the newly submitted information.

An *ex parte* communication is that which someone with an interest in the outcome seeks to have with the agency's decision maker. The law in Virginia is not clear as to how such matters should be handled. But in the interest of preserving both fairness and the appearance of fairness in the regulatory process, all such communication should be voluntarily disclosed by the recipient (typically a member of the board) and placed in the record so they are not kept secret and are known to all. The decision maker must then decide whether an opportunity for further public comment is necessary to assure that the record is complete and all interested parties have been treated fairly and consistent with law.

### **Keeping a permanent record**

Agencies, of course, must keep the "regulatory record." This may generally be defined as any document or information used by the agency in making its decision to promulgate a regulation. Such materials must be kept **at a minimum** until the time for challenging the regulation has passed. The better practice is to keep them as long as the regulation is in effect and is thus subject to an "as applied" challenged by someone against whom it is sought to be enforced. See [§ 2.2-4007 of Code of Virginia](#).

### **Incorporation by reference**

This is governed by the Virginia Register Act and, in particular, § 2.2-4103 of the Code of Virginia. This statute states in part:

*Where regulations adopt textual matter by reference to publications other than the Federal Register or Code of Federal Regulations, the agency shall (i) file with the Registrar copies of the referenced publications, (ii) state on the face of or as notations to regulations making such adoptions by reference the places where copies of the referred publications may be procured, and (iii) make copies of such referred publications available for public inspection and copying along with its other regulations.*

See also, [January 24, 1994 Regulations of the Virginia Code Commission for Implementing the Virginia Register Act, Part III, §§ 3.1-3.3.](#)

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## What type of regulatory action is appropriate

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Action Type	Description	Code of VA
<a href="#">Standard</a> (NOIRA, proposed, final stages)	This action is appropriate when (1) it does not qualify as an exempt action, (2) the agency has no authority to promulgate an emergency regulation, and (3) the proposal may be controversial.	<a href="#">§ 2.2-4007 to 4017</a>
<a href="#">Fast-track</a>	For rulemaking expected to be noncontroversial. A rulemaking is deemed noncontroversial if no objections are received from (1) certain members of the General Assembly or (2) ten or more members of the public.	<a href="#">§ 2.2-4012.1</a>
<a href="#">Emergency</a>	There is an imminent threat to public health or safety OR the authorizing legislation requires that a regulation be effective in 280 days or less from enactment. The regulation is not exempt.	<a href="#">§ 2.2-4011</a>
<a href="#">Exempt</a>	Agency must implement regulatory action (no discretion is involved); the regulatory action involves minor changes, does not differ materially from federal law/regulations, relates to internal workings of the agency, or is otherwise listed as exempt.	<a href="#">§ 2.2-4002</a> and <a href="#">§ 2.2-4006</a>

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# Charts of regulatory processes

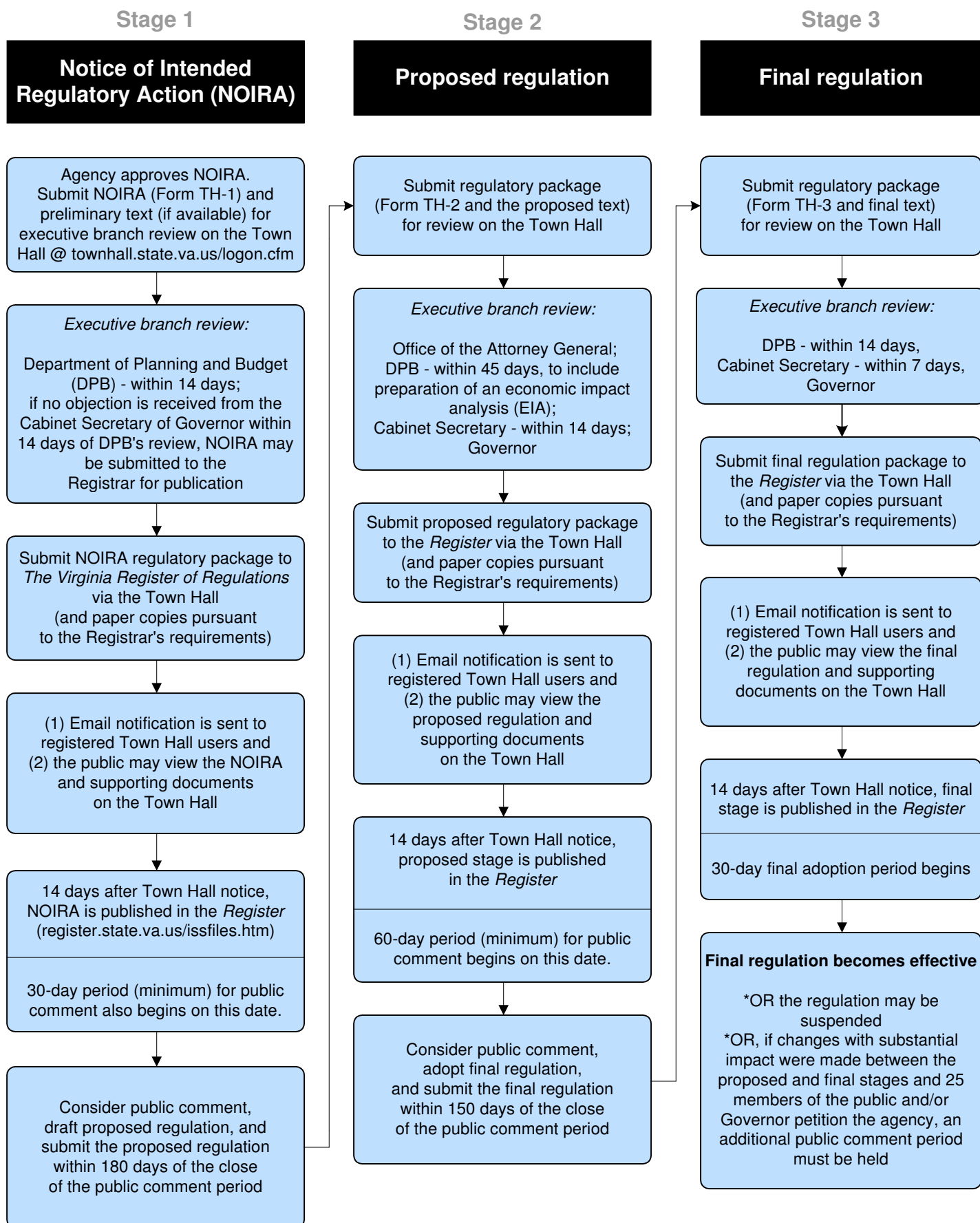
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## Flow charts of regulatory processes (PDF documents)

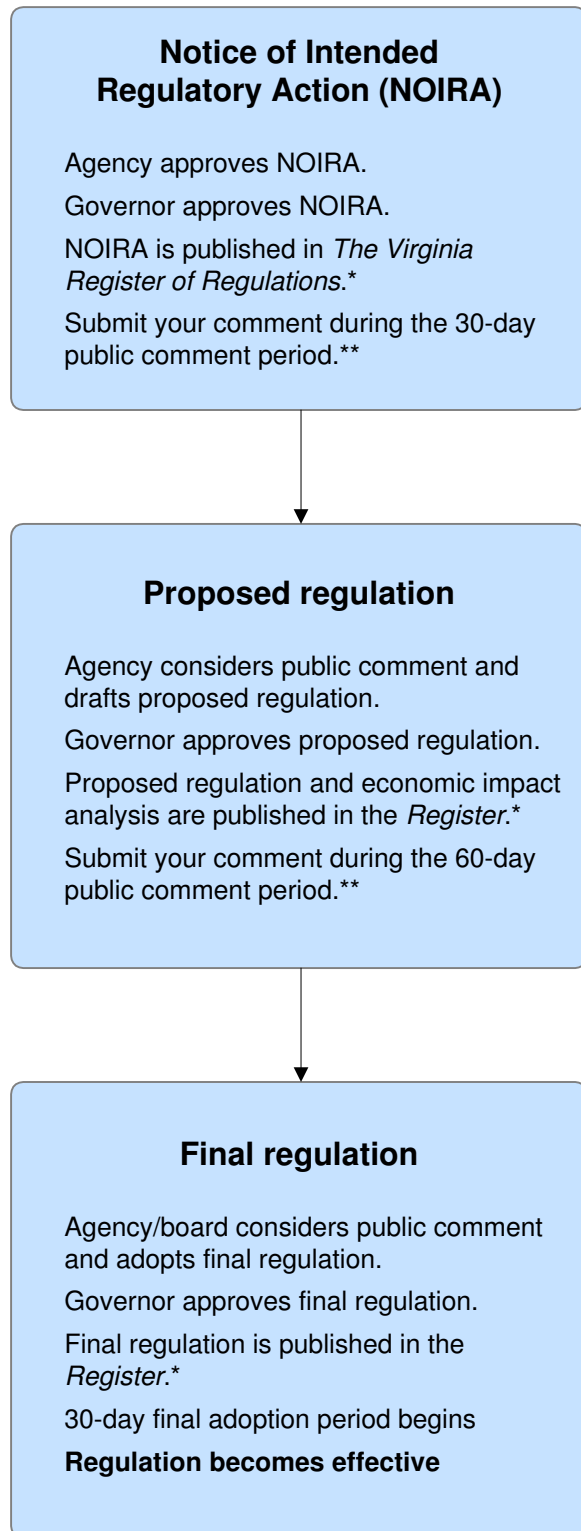
- [\*\*Standard\*\* regulatory process \(for state agencies\)](#)
- [Standard regulatory process - basic outline \(for public\)](#)
- [Standard regulatory process - detailed outline \(for public\)](#)
  
- [\*\*Emergency\*\* regulatory process \(for state agencies\)](#)
- [Emergency regulatory process \(for public\)](#)
  
- [\*\*Fast-track\*\* regulatory process \(for state agencies\)](#)
- [Fast-track regulatory process \(for public\)](#)
  
- [\*\*Petition for rulemaking\*\* process \(for state agencies\)](#)
- [Petition for rulemaking process \(for public\)](#)

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# Standard regulatory process: Guide for state agencies



# Standard regulatory process: Basic outline




## \*A regulatory stage is announced as follows:

- (1) email notification is sent to registered users of the Virginia Regulatory Town Hall ([townhall.virginia.gov](http://townhall.virginia.gov)) and users may view the regulatory stage on the Town Hall;
- (2) 14 days after Town Hall notice, the regulatory stage is published in *The Virginia Register of Regulations* ([register.state.va.us/issfiles.htm](http://register.state.va.us/issfiles.htm)), the official publication of legal record for regulations in Virginia; and
- (3) the rulemaking agency will notify individuals on its mailing list and may post information on the agency's website.

**\*\*During the public comment period** (that begins on the date the stage is published in the *Register*), submit your comment to the Town Hall Public Comment Forum.

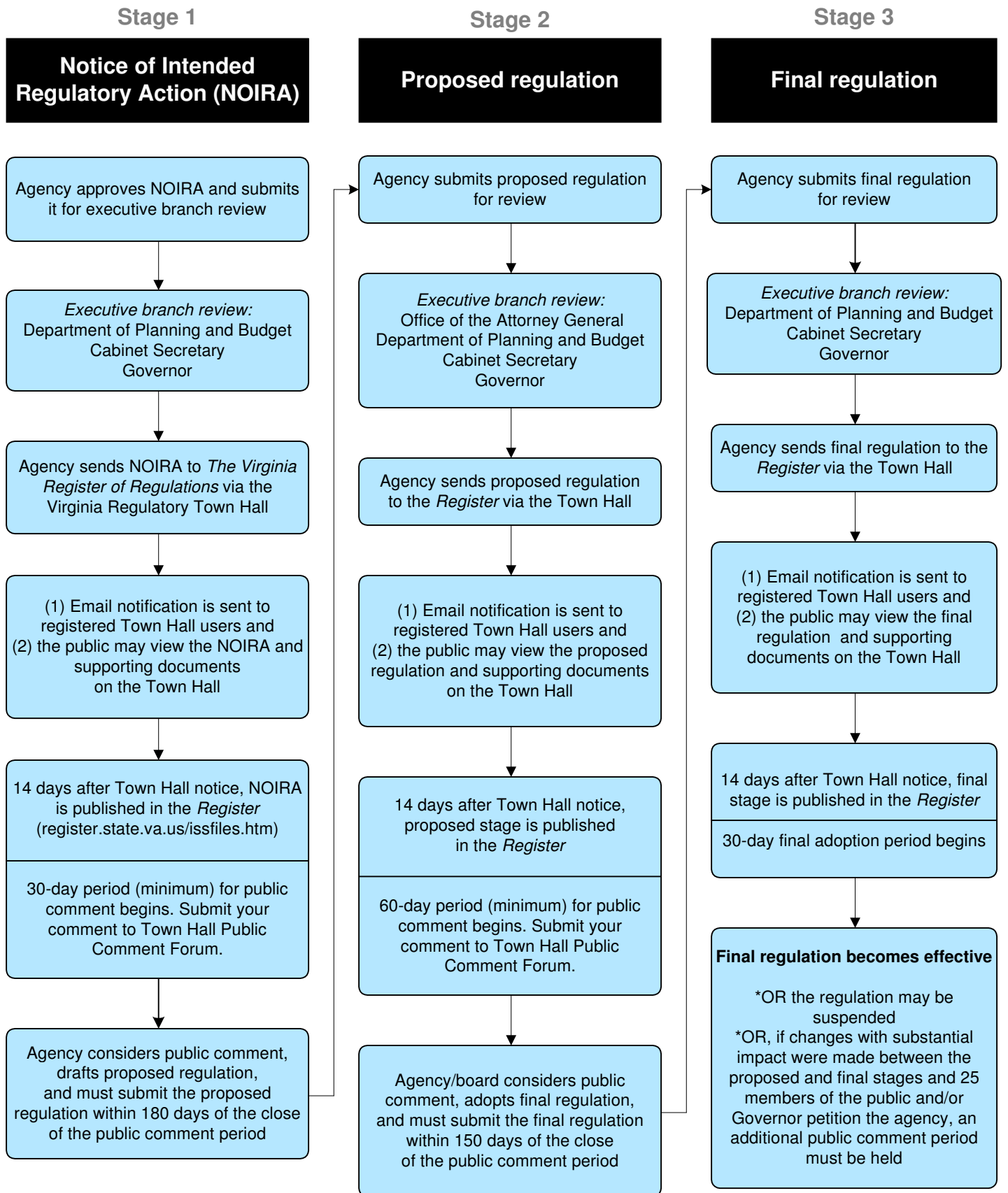
*Source:* Sections 2.2-4006 through 2.2-4017 of the Code of Virginia (Article 2 of the Administrative Process Act)



For more information on  
regulations in Virginia,  
visit the award-winning  
Virginia Regulatory Town Hall  
@  
[townhall.virginia.gov](http://townhall.virginia.gov)



# Standard regulatory process: Detailed outline



# Emergency regulations:

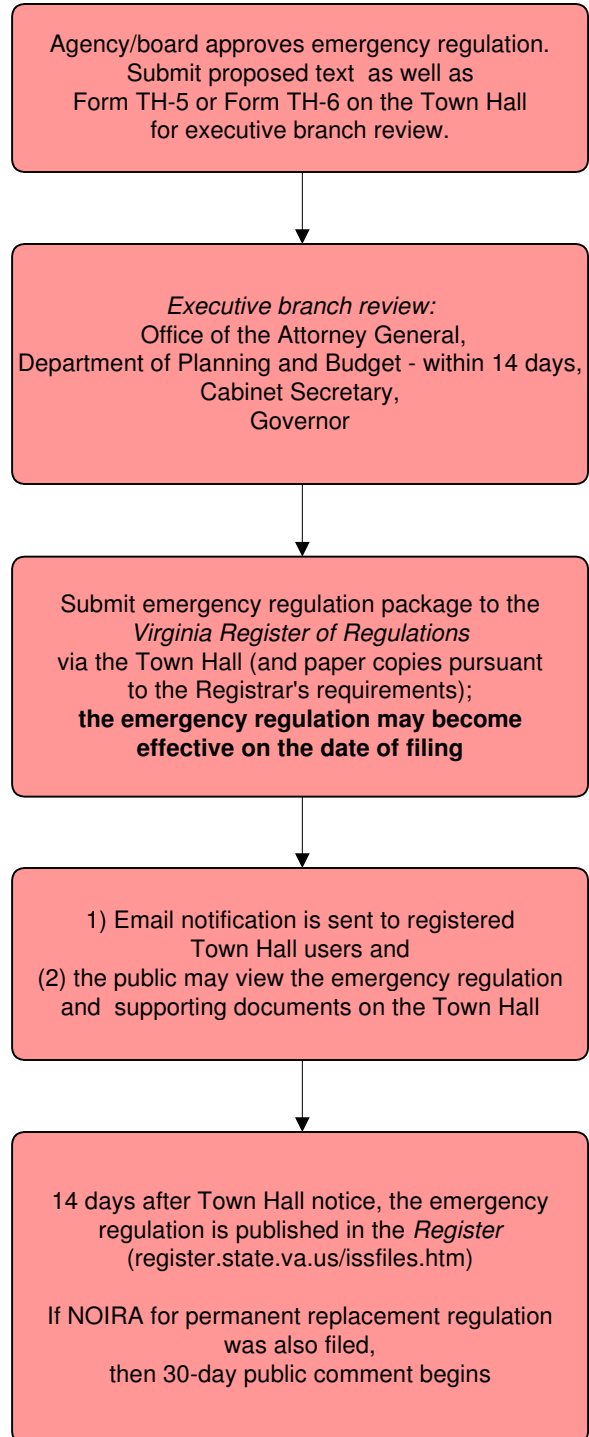
## Information for state agencies

### An emergency regulation:

- may be effective for up to one year;
- may go into effect upon approval by the Governor and filing with the Registrar of Regulations.
- may be promulgated if there is an "emergency situation" (1) involving an imminent threat to public health or safety or (2) in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt; and
- is usually replaced with a permanent regulation; therefore, a Notice of Intended Regulatory Action (NOIRA) to promulgate the permanent replacement regulation is often filed at the same time as the emergency regulation.

Source: Code of Virginia Section 2.2-4011

### Regulatory process:



For more information on performing agency functions on the Town Hall, log on as an agency user and view the User Manual @

[townhall.virginia.gov/UserManual/Index.cfm](http://townhall.virginia.gov/UserManual/Index.cfm)




# Emergency regulations

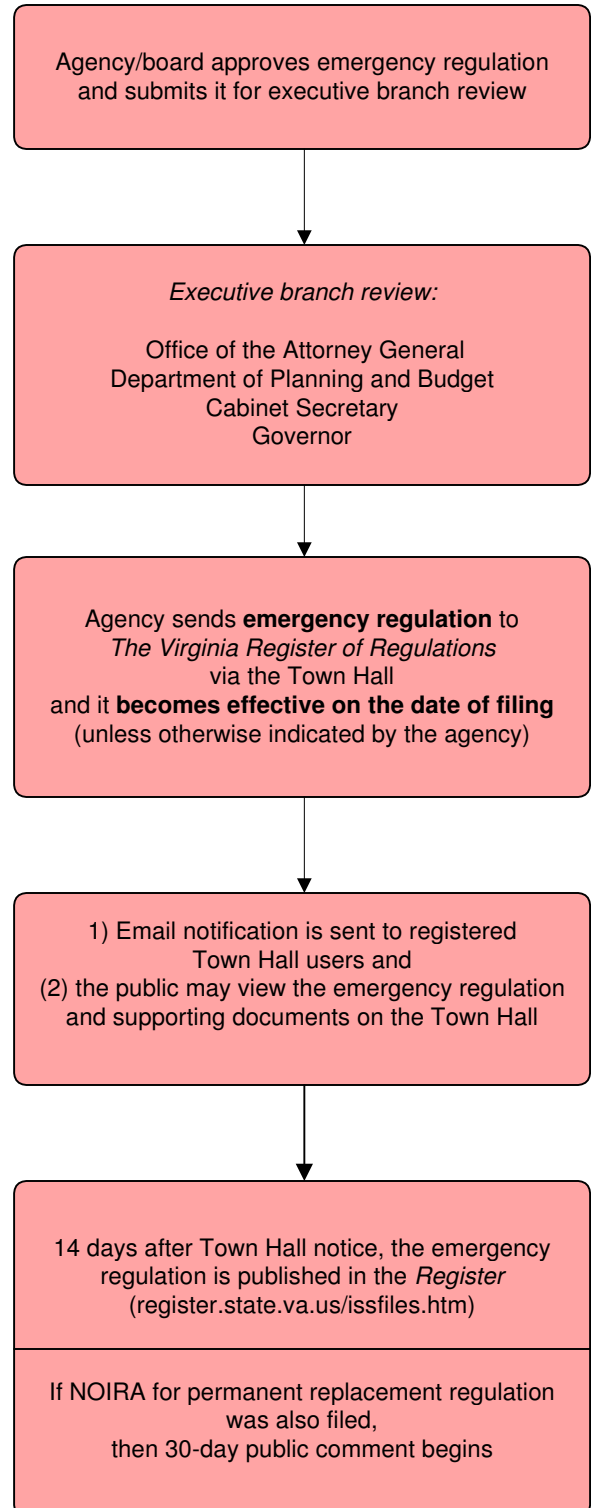
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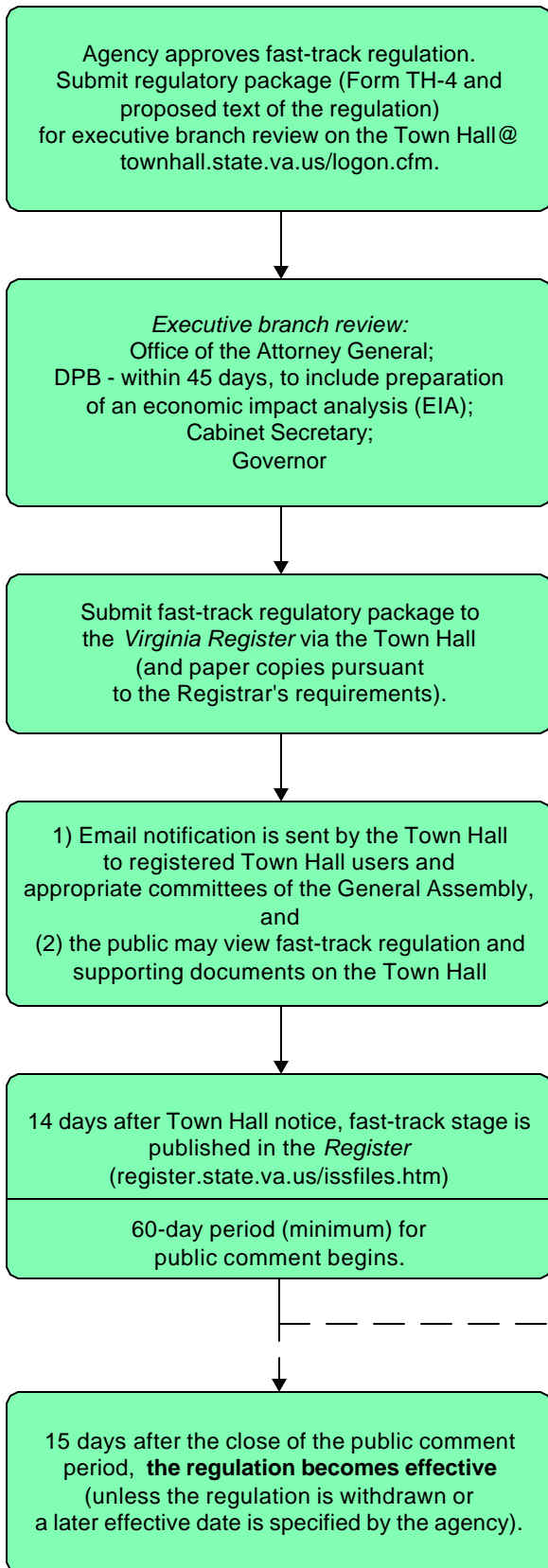
Source: Section 2.2-4011 of the Code of Virginia

  
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## Regulatory process:



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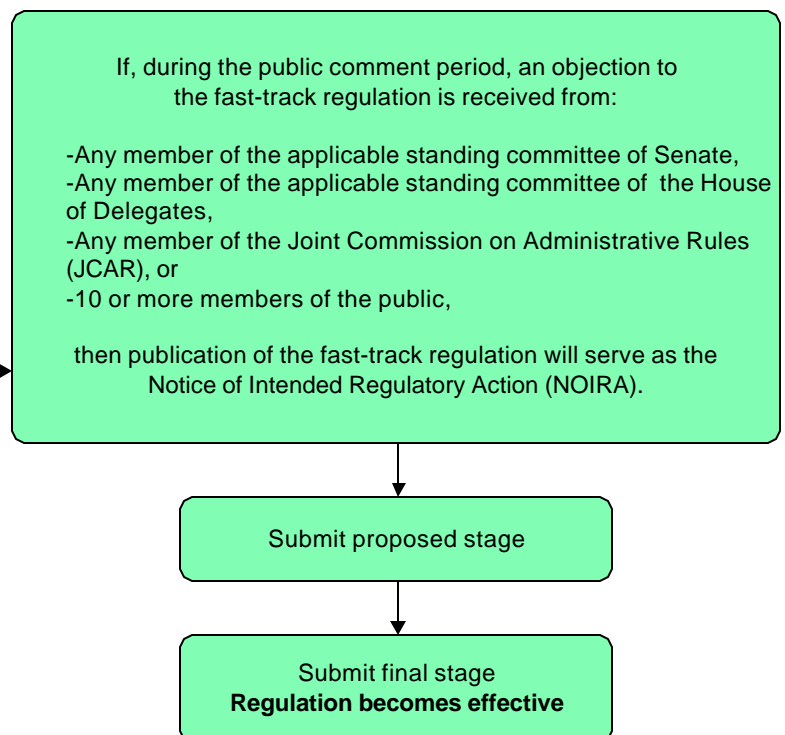
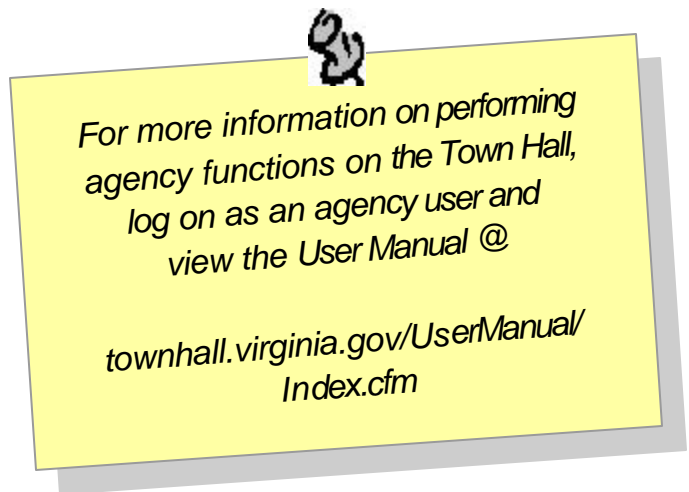


## Fast-track regulations:

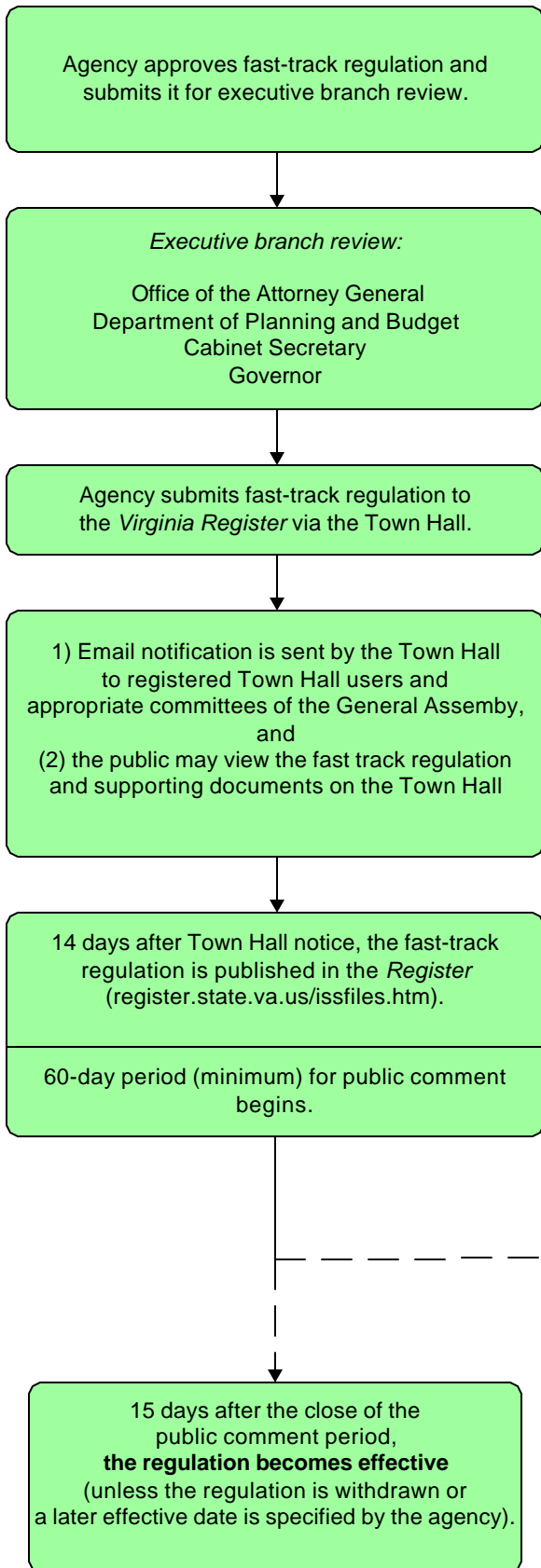
### Information for state agencies

The fast-track process is for proposed regulations that are expected to be noncontroversial. Whether a proposed regulation is noncontroversial is determined by the process detailed on this page.

Source: Section 2.2-4012.1 of the Code of Virginia



## Regulatory process:



# Fast-track regulations

The fast-track process is for proposed regulations that are expected to be noncontroversial. Whether a proposed regulation is noncontroversial is determined by the process detailed on this page.

Source: Section 2.2-4012.1 of the Code of Virginia

For more information on regulations in Virginia, visit the award-winning Virginia Regulatory Town Hall @ [townhall.virginia.gov](http://townhall.virginia.gov)

If, during the public comment period, an objection to the fast-track regulation is received from:

- Any member of the applicable standing committee of Senate,
- Any member of the applicable standing committee of the House of Delegates,
- Any member of the Joint Commission on Administrative Rules (JCAR), or
- 10 or more members of the public,

then publication of the fast-track regulation will serve as the Notice of Intended Regulatory Action (NOIRA).

Proposed stage

Final stage  
**Regulation becomes effective**



# Petitions for rulemaking:

## Information for state agencies

A "petition for rulemaking" is a request by a person(s) to an agency/board to develop a new regulation or amend an existing regulation.

Source: Section 2.2-4007.A of the Code of Virginia

For more information on performing agency functions on the Town Hall, log on as an agency user and view the User Manual @

[townhall.virginia.gov/UserManual/Index.cfm](http://townhall.virginia.gov/UserManual/Index.cfm)

## Regulatory process:

You will receive a letter/email that includes the following:

Reason(s) why person wishes to change an existing regulation or create a new regulation, (if an existing regulation, it will include the Virginia Administrative Code citation)

Cite to legal authority of the agency/board to take the action requested

The phrases, "Code of Virginia Section 2.2-4007.A" and/or "petition for rulemaking" may also be mentioned .

Within 14 days of receiving the person's request, you must send a notice with the person's name, the nature of his request, and your plan for handling the request to the *Virginia Register* via the Town Hall (and paper copies pursuant to the Registrar's requirements).

Upon submitting this notice, all users of the Town Hall may view it

Request for rule change is published in the *Virginia Register* ([register.state.va.us/issfiles.htm](http://register.state.va.us/issfiles.htm))

21-day public comment period also begins on this date

Within 90 days, your agency/board must issue a written decision to grant or deny the person's request (unless the agency/board has not met within the 90-day period, in which case it must provide a written decision no later than 14 days after it next meets).

The agency's decision must include its reasons for taking action or no action and be published in the *Register* via the Town Hall.

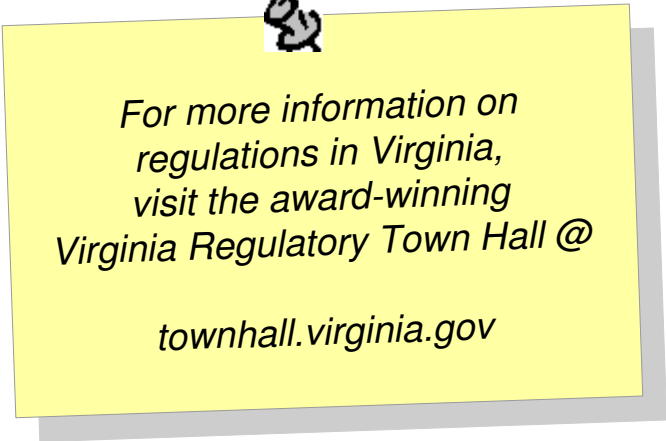
Note: Agency decisions regarding requests to change a rule are not subject to court review



# Petitions for rulemaking

A "petition for rulemaking" is simply a request by a person(s) to an agency/board to develop a new regulation or amend an existing regulation.

Source: Section 2.2-4007.A of the Code of Virginia



For more information on regulations in Virginia, visit the award-winning Virginia Regulatory Town Hall @ [townhall.virginia.gov](http://townhall.virginia.gov)

## Regulatory process:

Submit to the agency/board a letter/email that includes the following:

Though not legally required, be sure to include the phrases, "Code of Virginia Section 2.2-4007.A" and "petition for rulemaking" so that an agency is sure to know how to handle your request .

The reason(s) why you wish to change an existing regulation or create a new regulation, (if an existing regulation, include the Virginia Administrative Code citation, e.g., 1 VAC 2-30)

Cite the legal authority of the agency/board to take the action requested, e.g., Code of Virginia § 12.3-45, i.e., the language that says a board or agency can or must promulgate regulations.

Within 14 days of receiving your request, the agency/board must send a notice with your name, the nature of your request, and its plan for handling your request to the *Virginia Register*.

Once this notice has been submitted to the *Virginia Register*, it will appear on the Town Hall website at [townhall.virginia.gov](http://townhall.virginia.gov)

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The agency's decision must include its reasons for taking action or no action and be published in the *Register*. The agency's decision also appears on the Town Hall.

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# Public participation in rulemaking

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- [Best practices](#)
- [Public participation guidelines \(PPGs\)](#)
- [Town Hall public participation features](#)
- [Ad hoc advisory committees/technical advisory committees \(TACs\)](#)
- [Board meetings](#)
- [Public hearings](#)
- [Petitions for rulemaking](#)
- [Public comments](#)

## Best practices

Do everything you can to encourage public participation in the regulatory process. Here's why. Public involvement:

- **Tends to improve the quality of regulations.** Public comments often point out ambiguities in language, omissions, unintended consequences, and other problems that may have been overlooked.
- **Puts your agency in the best position to make the right choices.** By seeking input from people with different perspectives on a regulation early on at or before the NOIRA stage (and before drafting the regulation), the agency will be more fully aware of the issues, the evidence to support the various approaches that might be taken, and to ultimately make the best choices.
- **Helps to allay people's concerns.** It is best to avoid a situation where significant opposition and controversy are generated upon the publication of a regulatory action. By communicating with concerned parties before publication, you will not only be able to gauge reaction, but help to avoid problems from developing.
- **Helps to build support for the regulatory action.** Regulators' and other interested parties' belief that they have been heard in the regulatory process translates into support, as well as compliance with the regulatory action once it is implemented.
- **Helps to educate regulators in advance of implementation.** This will also help to minimize surprise on the part of the regulated community.
- **Helps to build good will for your agency.** Actively seeking input from the public and responding in a meaningful fashion will reap valuable dividends in the form of greater trust and an enhanced reputation in the regulated community and beyond.

## Public participation guidelines (PPGs)

[Section 2.2-4007 \(D\)](#) of the Code of Virginia requires all non-exempt agencies to promulgate public participation guidelines (PPGs) in order to facilitate public involvement in the regulatory process. Even though they are called guidelines, they are in fact regulations by which your agency or board must abide. PPGs must set out any methods for identifying and notifying people who might be interested in a regulatory action, and any specific means for seeking input from interested persons or groups your board or agency intends to use in addition to the NOIRA.

In addition, PPGs must set out provisions for the use of standing or ad hoc advisory panels and consultation with groups and individuals who want to work with an agency to develop a regulatory action. The PPGs must also address the circumstances in which an agency considers a panel or consultation appropriate and intends to make use of a panel or consultation.

## Town Hall public participation features

The Town Hall contains several features to enhance public participation in the regulatory process. These include an agency mailing list function, an e-mail notification service, and public comment forums.

**Agency mailing list.** You may send e-mail to users who have signed up on your notification list, as well as view and download user information associated with any board or regulations of your agency. You may wish to use this feature, for example, when you are sending out a summary of public comments and the agency's response to these comments, as well as when implementation questions arise so you may explain how an issue will be handled. [Click here](#) for more information.

**E-mail notification service.** Registered users of the Town Hall may sign up to receive e-mail notification about regulatory actions and meetings related to any agencies, boards, and regulations in which they are interested.

**Public comment forums.** Registered users of the Town Hall may submit comments in on-line public comment forums. [Click here](#) for more information.

### **Ad hoc advisory committees/technical advisory committees (TACs)**

Often an agency will put together a committee consisting of regulants, advocacy groups, and other concerned citizens to assist the board in drafting or amending a regulation.

[Section 2.2-4007 \(D\)](#) of the Code of Virginia states that an agency's public participation guidelines (PPGs) must set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups and individuals who want to work with an agency to develop a regulatory action. The PPGs must also address the circumstances in which an agency considers a panel or consultation appropriate and intends to make use of a panel or consultation.

### **Public comments**

[Pursuant to § 2.2-4007 \(A\)](#) of the Code of Virginia, the public has an opportunity to comment on a non-exempt regulatory action after the publication of each stage in the *Register*.

**NOIRA stage.** Once published in the *Register*, the agency receives public comment for at least 30 days.

**Proposed stage.** Once published in the *Register*, the agency receives public comment for at least 60 days.

**Final stage.** Once published in the *Register*, there is a 30-day adoption period. Pursuant to [§ 2.2-4007 \(J\)](#) of the Code of Virginia, if any changes with substantial impact has been made to the regulation between the proposed and final stages then, during the 30-day adoption period, any person can request the agency to receive further comment. If the agency receives requests from the Governor or at least 25 people, then the agency must (1) suspend the regulatory process for 30 days to receive further public comment, and (2) file notice of the additional 30-day public comment period with the Registrar, unless the agency determines that the changes made are minor or inconsequential in their impact. If there is an additional comment period, it is to begin on the date the notice of public comment appears in the *Register*.

**Note:** If an agency refuses to hold another comment period upon a request to receive additional comment, its decision is subject to court challenge.

You may open on the Town Hall an on-line public comment forum in connection with any regulatory stage. [Click here](#) for more information.

### **Board meetings**

All board meetings expected to address regulations are posted on the Town Hall calendar. [Click here](#) for more information.

As a general rule, all board meetings are open to the public. You may find that members of the public attend these meetings to become more informed about regulatory actions and/or offer their comments on regulations in development. In order to encourage public participation in the regulatory process, you are encouraged to, if possible, set aside time to receive input from the public during these meetings.

## Public hearings

In the context of regulations, public hearings are generally convened for the sole purpose of receiving public comment on a regulatory action. Board members and/or agency staff are present to receive and respond to public comments.

All public hearings expected to address regulations are posted on the Town Hall calendar. [Click here](#) for more information.

Pursuant to [§ 2.2-4007 \(C\)](#) of the Code of Virginia, an agency must indicate in its NOIRA whether it plans to hold a public hearing after the proposed stage is published in the Register. Agencies hold such public hearings if required by basic law, their public participation guidelines, or agency policy. If the agency states in its NOIRA that it will hold a public hearing on the proposed regulation, then it must hold the public hearing.

If the agency states in its NOIRA that it does not plan to hold a hearing on the proposed regulation, then no public hearing is required unless, prior to the end of the NOIRA comment period, (1) the Governor directs the agency to hold a public hearing or (2) the agency receives requests for a public hearing from at least 25 persons.

Remember to record the proceedings of your public hearing and to produce a transcript as part of your agency record.

## Petitions for rulemaking

A petition for rulemaking is a request made by any individual that an agency or board develop a new regulation or amend an existing regulation. Click [here](#) to see a flow chart of the petition for rulemaking process.

The steps for submitting a petition for rulemaking to an agency are set out in [§ 2.2-4007 \(A\)](#) of the Code of Virginia. In addition, in order to qualify as a “petition for rulemaking,” the communication must (1) state the substance and purpose of the regulatory action that is requested (including reference to any applicable VAC sections), and (2) reference the legal authority of the agency to take the action requested.

The process for handling these petitions for rulemaking is summarized below:

**Step 1:** Within 14 days of receiving a request, the agency or board shall send to the *Register* the following information: the substance and purpose of the request and the date the request was received.

**Step 2:** When the information about the petition for rulemaking is published in the *Register*, the agency must begin a 21-public comment period on the request.

**Step 3:** Within 90 days after the close of the comment period, the agency or board must issue a written decision to grant or deny the request for rulemaking. However, if the board has not met within that 90-day period, the Board must issue a written decision no later than 14 days after it next meets.

**Step 4:** The written decision issued by the agency or board must include a statement of its reasons and be submitted to the *Register*.

Agency decisions to initiate or not initiate rulemaking in response to petitions are not subject to court challenge, however, it is good practice to initiate rulemaking as soon as possible when it appears necessary to commence a regulatory action.

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# Executive branch review of regulatory actions

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## Review by the Office of the Attorney General (OAG)

The formal role of the Attorney General in the regulatory process is limited. [Section § 2.2-4013 \(A\)](#) of the Code contains the only statutory duty—to review regulations for statutory authority. Recent executive orders have expanded the number and nature of certifications agencies are to request from the OAG. Typically an agency will contact its own counsel within the OAG and request one of these certifications. Experienced regulatory coordinators will work with their counsel so that deadlines can be met and problems avoided and, if possible, involve their own counsel during the preliminary stages of development.

The less formal role of the OAG varies, but it can be considerable. Some agencies involve their counsel in the development of some or all of their regulations. When appropriate, this may save considerable time. If the lawyer is in on the ground floor, drafting problems may be eliminated and delays avoided. Legal problems identified in a draft or final regulation are typically handled through privileged communications which, even if put in writing, do not find their way into the public record. Statements of authority, on the other hand, are made part of the agency's regulatory package and so are public documents.

## Department of Planning and Budget economic impact analysis (EIA)

An economic impact analysis (EIA) is completed at the fast-track and proposed stage of every non-exempt regulatory action. EIAs are required pursuant to [§ 2.2-4007\(G\) of the Code of Virginia](#). Additional requirements for EIAs are set out in [Executive Order 21 \(2002\)](#). Once a proposed stage or fast-track regulatory package is submitted to DPB on the Town Hall, DPB has 45 days to complete an economic impact analysis.

### What is an economic impact analysis (EIA)?

An economic impact analysis (EIA) is a standardized technique that DPB uses to measure the effects of a regulatory action and present its findings in a way that facilitates the making of effective policy choices.

### Economics and regulatory design: Best practices

There are often many ways to design a regulation. It is best to draft a regulation that achieves the required ends at the lowest possible cost and with the least intrusion into the voluntary choices of individuals and firms.

In general, your regulation should specify **results** rather than specific actions. This leaves the challenge of finding the best way to achieve the results to those with the most knowledge about the particular circumstances of each individual or firm. Maximizing flexibility has the added advantage of giving people incentives to innovate. In the long run, the incentive to innovate is probably the most important cost-reducing element of regulatory design.

### What types of questions can I expect from a DPB economist?

Regulatory actions often change the incentives that people have and the way economic resources are allocated. DPB economists attempt to measure this change in economic activity by (1) identifying the incentives created by the regulatory action, (2) and then predicting the actions that will result from these incentives. In tracing these effects, a DPB economist identifies those changes in employment, property values, the distribution of costs and benefits, and other impacts attributable to the regulatory proposal. **One advantage of this process is that you are made aware of any unintended consequences of a proposed regulation.**

**Risk assessment** is the process of listing the possible consequences of a proposed regulatory change and attaching to each possible outcome a probability that the event will occur. For example, a DPB economist might be interested in knowing how a proposed regulation to increase the fire separation distance between residential buildings will affect the likelihood that such buildings will burn down. A risk assessment would use engineering information to assess all of the ways that the regulation affects the potential for a fire and the resulting probabilities of a fire occurring.

For a detailed explanation of methods used to prepare an EIA, [click here](#).

An EIA generally reports results (1) as a range of possible outcomes, and (2) in a way that makes clear both the best estimate of impact and the range of uncertainty. EIAs can help you make better choices by suggesting the most efficient and effective strategies for achieving a given result, and making sure that you are fully informed of the tradeoffs implicit in any policy decision.

It is DPB's practice to make an agency aware of, and try to resolve during a stage, any issues that DPB has identified regarding a regulation. Sometimes it is not possible to resolve these problems within the period allotted to DPB to complete its review, e.g., the agency agrees a change is appropriate but needs time to revise the proposed text of the regulation and/or the proposed text may not be changed without formal approval by the board. In these cases, it is common for an agency to retract the stage or action from the Town Hall in order to fix any problems, and then to resubmit the stage or action at a later date.

## Department of Planning and Budget policy analysis

A policy analysis is completed at every stage of non-exempt regulatory actions. Policy analyses are required pursuant to [Executive Order 21 \(2002\)](#). Once a regulatory package is submitted to DPB on the Town Hall, DPB has 14 days to complete its analysis for emergency and NOIRA stages, 45 days for a proposed stage and fast-track stage, and 14 days for a final stage.

DPB's policy analyses are considered confidential working papers of the Governor under the Freedom of Information Act and are not published on the Town Hall. However, a DPB policy analysis typically addresses the following issues, pursuant to Executive Order 21 (2002):

- Only regulations that are essential to protect the health, safety and welfare of citizens or for the efficient and economical performance of an important governmental function will be promulgated (unless otherwise mandated by statute).
- No regulation will be promulgated if there are less burdensome or less intrusive alternatives available that will satisfy any applicable state or federal legal requirements and achieve the essential purpose for which the regulatory action is undertaken.
- Regulations are to be clearly written and easily understandable by the individuals and entities affected.
- All legal requirements related to public participation and all public participation guidelines must be strictly followed to ensure that citizens have reasonable access and opportunity to present their comments and concerns.
- Regulations are to be carefully designed using the best available information.
- Agencies as well as reviewing entities must perform their tasks in the regulatory process as expeditiously as the regulatory subject matter will allow.

It is DPB's practice to make an agency aware of, and try to resolve during a stage, any issues that DPB has identified regarding a regulation. Sometimes it is not possible to resolve these problems within the period allotted to DPB to complete its review, e.g., the agency agrees a change is appropriate but needs time to revise the proposed text of the regulation and/or the proposed text may not be changed without formal approval by the board. In these cases, it is common for an agency to retract the stage or action from the Town Hall in order to fix any problems, and then to resubmit the stage or action at a later date.

### **Cabinet secretary's office**

A cabinet secretary has no legally imposed time frame within which to complete his review of non-exempt regulatory stages. **Note:** A NOIRA may be submitted to the Registrar for publication if (1) DPB has completed its review of the NOIRA, and (2) 14 days have passed without the Governor or the Secretary objecting to the NOIRA.

In reviewing regulatory actions, the secretary's offices have access to the reviews completed by the OAG and DPB. If there are outstanding issues relating to a regulatory action, they are often resolved when reviewed by the Secretary's office.

### **Governor's office**

The Governor's office has no legally imposed time frame within which to complete its review of non-exempt regulatory stages. **Note:** A NOIRA may be submitted to the Registrar for publication if (1) DPB has completed its review of the NOIRA, and (2) 14 days have passed without the Governor or the Secretary objecting to the NOIRA. In reviewing regulatory actions, the Governor's office has access to the reviews completed by the OAG, DPB, and the Secretary's office.

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# How to write a regulation

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## Do you need a regulation?

To determine if you need a regulation, consider the following questions or issues:

- Could better enforcement of existing laws and regulations achieve the desired goal?
- Is the problem the regulation seeks to address an isolated case or of sufficiently broad concern to justify a state regulation?
- Is the proposed regulation simply a response to a crisis which may subside on its own or is it designed to address a persistent lasting concern?
- Have alternatives to regulatory action been fully considered? Such alternatives include taking no action, exploring profit or non-profit solutions, working out voluntary agreements with affected parties, public education, and local government or federal action.
- **Is this regulatory subject matter?** Regulations contain provisions with which people must comply and which programs must follow. They are general rules governing people's rights or conduct. On the other hand, regulations do not contain recommendations, model procedures, lists of resources, or information on agency internal practice or procedures (except for public participation guidelines), otherwise known as guidance documents.
- **Do you have authority to promulgate a regulation?** A regulation must be authorized by law. This means that in your agency's basic statute in the Code of Virginia or somewhere in the U.S. Code or Code of Federal Regulations, your agency has been granted express or implied authority to promulgate the regulation.

## Getting Started

Your goal is to craft a regulation with clear and simple language that is logically organized, accomplishes its purpose with no intended consequences, permits and facilitates day-to-day agency decisions, and sustains and protects the agency in the event the regulation is challenged in a court of law.

Now put your mind in a brainstorming mode. Consider the following questions before you start writing:

- What is the overall objective of the regulation? Put another way, what is the problem or situation that the regulation is intended to address?
- Who and what areas do you need to regulate? What will the regulation permit, prevent, encourage, discourage, and require?
- If there is a statutory mandate for promulgating this regulation, does it set out specific areas that the regulation must address?
- Can you incorporate by reference any documents into your regulation, e.g., federal law and regulation, court decisions, or standards set by a national organization, rather than repeating language verbatim in the regulation?
- Is your agency regulating anything like it now? If yes, how is this regulatory action the same

or different from what you are already regulating? If no, be sure you have the authority to regulate this new area.

- What is the scope of your authority to regulate? Keep a copy of this authority handy because you may need to refer to it when you're writing.
- Put yourself in the place of the regulated community as you think about imposing a new requirement. What would the compliance costs, including paperwork requirements, be? Would the new requirement provide maximum flexibility to regulated parties?
- What do the agency's public participation guidelines (PPGs) require? Are you required to convene an ad hoc committee of affected entities to develop the regulation? If the subject is large and complex or there are multiple approaches to regulation, and you believe input would be helpful, you may wish to convene an ad hoc committee anyway.
- Review the [Notice of Intended Regulatory Action \(NOIRA\) form](#) or other form you will be filing on the Town Hall to see what information is required. This is especially useful if your action is subject to executive branch review because there will be a full review of these issues at that time.

## Putting pen to paper

First, look at the following suggestions on how to write a user-friendly document from the Plain English Network. Links are provided for additional information.

- [Identify your audience](#)
- [Use the present tense](#)
- [Address one person, not a group](#)
- [Use short sentences](#)
- [Divide your material into short sections](#)
- [Limit each paragraph to one topic](#)
- [Use lots of informative headings](#)
- [Use if-then tables](#)
- [Use a question and answer format](#)

## Think about the big picture.

Start with big general topics and work down to smaller specific ones. It is very easy to get lost in the details, so you may wish to prepare an outline of your big topics. An outline will permit you to sort through the big topics and rearrange them into a more logical order before you delve into the details. Also, if someone else in your agency will actually be writing the major substance of the regulation, an outline of large topics will help to focus his writing.

## Get everything down on paper.

At this stage, the objective is to include everything in the regulation that may need to be addressed. Content omissions can be especially troublesome and executive branch reviewers do not always pick up on these. It is better to insert something you are not sure about and later delete it, than to leave it out and realize after implementation that the regulation would be better enforceable, complete, clear, etc., if the provisions had been added.

Write without worrying about proper citations, syntax, grammar, and spelling. Plenty of people will review the regulation behind you who will catch such details and point them out to you.

## Put yourself in the place of the regulated entity.

As you capture the needed content, try to imagine yourself as the regulated entity who must comply with the regulation. What problems do you encounter? Are there needs that the regulation does not address? Are there provisions in the regulation that now seem unnecessary?

## Organizing the regulation.

Many regulations begin with definitions and then list general requirements that apply to all regulants. Some regulations follow the organization of their enabling statute or federal regulations, if applicable. Whatever approach you take, try to make the organization of the regulation as

intuitive as possible so that the regulated community can easily find and understand the requirements that apply to them. Typically, regulations are organized into parts (e.g., Part I, II, III), sections (e.g., 12 VAC 24-45), and subsections (e.g., 12 VAC 24-45 (A)).

### Requesting feedback

Once you have drafted your regulation and feel reasonably comfortable with it, it is a good idea to get feedback from inside the agency and out. Distribute the regulatory package widely—to any technical advisory committee associated with the regulation, and even across the agency, especially if it is complex and multi-faceted.

You might also arrange a meeting of some members of the regulated community to get their reaction to the draft regulations. Pick your test subjects carefully so that you can ensure the best possible feedback.

### Finalizing the regulation

After you have written the regulation and received feedback, go back to the text of the regulation and focus on the details, e.g., proper citations, syntax, grammar, and spelling.

All regulations submitted to the Registrar must conform to [The Virginia Register Form, Style, and Procedure Manual](#), particularly “Part V: Style Guidelines” (pages 29-48). The Manual states on page 6 that, “Regulations will be edited, as necessary, for grammatical correctness and consistency of language to conform with the journalistic style of the *Virginia Register*.” If you wish to minimize the chance that the Registrar will change the text of your regulation, be sure to comply with the style requirements set out in the Manual.

The following are areas to pay special attention to, along with references to the Manual:

- Page headings, §5.2, page 28
- Strikeouts and underlines to indicate proposed changes to text, § 5.3, page 29
- Strikeouts, underlines, and brackets to indicate proposed changes to final stage text, § 5.3, page 29
- Citations to the Code of Virginia, § 5.15, page 34
- Citations to the Virginia Administrative Code, § 5.17, page 35
- Do not use and/or; instead, use “A or B or both,” § 5.39, page 46
- Material incorporated by reference, Part VII, page 53

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